REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 247 OF 2019

DUNCAN KARANJA NDUTA..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellant, *Duncan Karanja Nduta*, was tried and convicted of the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (3)* of the *Sexual Offences Act No. 3 of 2006* (the *Act*).

2. The particulars of the offence were that on 14th September 2015 at Kawangware area within Nairobi County, the appellant unlawfully and intentionally penetrated with his male organ the vagina of *WRW* (*name withheld*) a girl aged 13 years.

3. Upon conviction, he was sentenced to serve 20 years imprisonment. He was dissatisfied with his conviction and sentence hence this appeal.

A perusal of the court record shows that the appellant, through his then advocates, *Kihanga & Company Advocates* filed two sets of the record of appeal on 5th December 2019 but they contained the same petition of appeal.

4. In his petition of appeal, the appellant advanced a total of 15 grounds of appeal which were largely a duplication of each other. In the main, the appellant complained that the learned trial magistrate erred in law and in fact by: convicting him on the basis of evidence which was uncorroborated and inconsistent and was not sufficient to prove the charges preferred against him beyond any reasonable doubt; convicting him on evidence which was inadmissible in law; failing to give reasons in the ruling placing him on his defence; convicting him on the basis of a defective charge sheet; failing to consider his plea in mitigation prior to sentencing.

5. On 29th April 2021, the appellant informed the court that he had withdrawn instructions from his advocates and that he wished to prosecute his appeal in person. During the hearing, both the appellant and the respondent chose to prosecute the appeal by way of written submissions which they duly filed.

6. The brief facts of the prosecution case as can be ascertained from the trial court's record is that on 14th September 2015 at about 2pm, the complainant (PW3) was at her parents' home together with her younger brothers when the appellant went to the home, picked her and took her to his cousin's house. PW3 recalled that on arrival, the appellant led her to the bedroom, laid her on a bed, removed her underpants and had sex with her. He then went for milk and after a while, he went back and chased her out of the house. This was at 9pm. She stayed outside the house till around 3am when a neighbour spotted her and offered her shelter till daybreak.

7. According to PW3, when she was walking home in the morning, she fainted. PW4 a good Samaritan found her lying beside the road and noted that she was unwell. She took her to Miliki Afya Clinic at Kawangware. PW3 gave her (PW4) a number to call which from the evidence of PW1, turned out to be the appellant's mobile number. Through the conversation that followed between the appellant and PW3, PW1 and PW3's father got to learn where she was calling from and together with PW4, they proceeded to the clinic. They picked PW3 and took her to Nairobi Women Hospital where she was examined and a Post Care Report form *(Pexhibit1)* was completed.

8. The Post Care Report form (PCR) shows that upon examination, PW3's vagina was found to be inflamed and her hymen was broken. The same findings were made by PW6 *Dr. Joseph Maundu* when he examined PW3 on 17th September 2015. He completed her P3 form which he produced as *Pexhibit6*.

9. When put on his defence, the appellant elected to give an unsworn statement and did not call witnesses. He narrated how he was arrested and denied having committed the offence as charged claiming that the charge was fabricated by the complainant with the aim of chasing him out of the area.

10. This being a first appeal to the High Court, I am enjoined to re-evaluate and subject the evidence tendered before the trial court to a fresh and exhaustive analysis to arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses. This was the holding in ***Okeno V Republic, [1972] EA 32; Kiilu & Another V Republic, [2005] 1 KLR 174*** among many other authorities.

11. In his submissions, the appellant referred to the three essential elements of the offence of defilement and asserted that the prosecution had not proved penetration to the victim's genitalia and that he was the perpetrator of the offence. He further faulted the learned trial magistrate for relying on the evidence of the victim (PW3) and that of the mother (PW1) which in his view was full of material contradictions and discrepancies making it incredible and unreliable.

12. In addition, relying on the Court of Appeal decision in ***P.K.W. V Republic, [2012] eKLR***, the appellant submitted that evidence of a broken hymen and an inflamed vagina were not conclusive proof of penetration; that the medical evidence relied on by the prosecution in this case did not conclusively prove penetration.

13. Further, the appellant submitted that failure of the prosecution to call vital witnesses to testify in support of its case was fatal and that investigations conducted in the case were shoddy. Regarding the consequences of failing to avail crucial witnesses, the appellant relied on the case of ***Paul Kanja Gitari V Republic, [2016] eKLR***.

14. According to the appellant, the learned trial magistrate failed to impartially and objectively analyse the evidence adduced during the trial and thereby wrongly convicted him on evidence which did not prove the charge preferred against him beyond any reasonable doubt. He urged me to find merit in the appeal and allow it as prayed.

15. The state contests this appeal. In submissions filed on its behalf by learned prosecuting counsel *Mr. Ishmael Kiragu*, the respondent supported the appellant's conviction and sentence. *Mr. Kiragu* submitted that the conviction was grounded on consistent and cogent evidence which proved all the three essential ingredients of the offence of defilement beyond any reasonable doubt.

16. Learned counsel denied the appellant's claim that the evidence adduced by the prosecution was riddled with material contradictions and inconsistencies and cited the Court of Appeal decision in ***Philip Nzioka Watu V Republic, [2016] eKLR*** for the proposition that whether or not discrepancies in evidence were material and rendered the evidence unbelievable depended on the circumstances of each case and the inconsistencies in question. Counsel implored me to find that the inconsistencies in this case were not material and urged me to dismiss the appeal for want of merit.

17. I have considered the grounds of appeal, the evidence on record and the submissions filed by both parties and all the authorities cited. I have also read the judgment of the trial court. Having done so, I find that only two key issues emerge for my determination, namely:

i. Whether the charge sheet was defective.

ii. Whether the prosecution proved the charge of defilement against the appellant beyond reasonable doubt.

18. Turning to the first issue, the law governing the framing of charges and information is set out in *Section 134* as read with *Section 137* of the *Criminal Procedure Code* (CPC). *Section 134* of the CPC states as follows:

> ***"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

Section 137 aforesaid expounds on *Section 134* and provides rules which should be followed in the drafting of charges and informations.

19. Looking at the charge sheet in this case, I find that it contains a statement describing the offence charged and the particulars thereof which contain information regarding when and how the offence was allegedly committed. In my opinion, the charge sheet fully meets the requirements of *Section 134* as read with *Section 137* of the *CPC* and is not defective as alleged by the appellant. Nothing therefore turns on that ground of appeal.

20. On the second issue isolated above for my determination, it is settled law that as correctly submitted by the appellant, the key ingredients of the offence of defilement which must be proved by the prosecution before securing a safe conviction are as follows:

i. Age of the victim.

ii. Penetration.

iii. Positive identification of the accused as the assailant.

21. Regarding the age of the victim, although it was alleged in the charge sheet that the victim was 13 years old at the time the offence was committed, the birth certificate produced by PW5 as *pexhibit4* shows that the victim was born on 1st September 2001 meaning that she was $13^1/_2$ years old on 14th September 2015 when the offence was allegedly committed. The slight discrepancy between the age stated in the charge sheet and the one proved is however immaterial given that the victim's proven age fell within the age bracket specified in *Section 8 (3)* of the *Sexual Offences Act* which prescribes the punishment for persons convicted of defiling minors aged between twelve and fifteen years.

In the premises, I am satisfied that the victims age was proved to the required legal standard. The Court of Appeal in the case of ***Mwarome Munga Janji V Republic, [2021] eKLR***, held as follows in ***Hadson Ali Mwachongo V Republic, [2016] eKLR***:

> ***"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim."*** [Emphasis]

22. On penetration and identification of the defiler, PW3 narrated how the appellant picked her from her house and led her to a certain house where he defiled her. Her evidence was supported by the medical evidence contained in *pexhibit1* and *pexhibit6* which confirmed that on examination, her vagina was found to be inflamed and her hymen was broken. Although the appellant in his submissions claimed that PW2 was not qualified to produce the PCR form *(pexhibit1)*, he failed to lay any basis for that claim and after considering PW2's evidence, I am satisfied that the claim is bereft of any merit.

23. Although the learned trial magistrate made reference in her judgment to the medical evidence adduced by PW2 and PW6, she did not apparently attach much weight to it. She based the appellant's conviction on the testimony of PW3 relying on the proviso to *Section 124* of the *Evidence Act* which removes the requirement for corroboration of the victim's evidence in sexual offences involving minors. The provision allows a court to convict an accused person on the sole evidence of the child victim if the trial court believed the minor's evidence and recorded its reasons for so doing.

24. In this case, the learned trial magistrate stated as follows when convicting the appellant:

> ***"In this case the complainant testified in details how she left her house to the scene of the defilement episode and she was rescued by the PW4. The evidence of the PW3 is consistent, well corroborated and on account of the nature of the offence. Considering the age of the complainant, the complainant was not capable to invent such sequence of events. This honourable court is satisfied and convinced that PW3 was the truthful witness and she told the court that she did not have any grudge with the accused. I am also convinced she will not have any reason to frame the accused. There is overwhelming evidence against the accused. ….."***

25. Regarding the appellant's claim that PW3 materially contradicted herself by giving two versions on why the appellant left the house after defiling her, I have compared the typed copy of the trial court proceedings covering PW3's evidence and the hand written proceedings and looking at the hand written proceedings, am unable to agree with the appellant's submissions that PW3's evidence contained material inconsistencies which made it unreliable. She clearly stated that after defiling her, the appellant went to buy milk before going back to chase her from the house. She did not at any time claim that he went for a long call. The reference to a long call appears to have been a typographical error in the typed proceedings.

26. Contrary to the appellant's submissions, my evaluation of PW3's evidence reveals that she was straightforward and consistent in her evidence regarding how the appellant defiled her. Her evidence was not shaken on cross examination by the appellant. I agree with the learned trial magistrate that she was a truthful witness. Even though there was no need for corroboration, in view of the proviso to *Section 124* of the *Evidence Act*, I find that her evidence on penetration was corroborated by the medical evidence produced during the trial.

27. As regards identification, there is no doubt from the evidence on record that PW3 and the appellant knew each other very well before the material date and were probably friends as indicated by PW7. This must be the reason why PW3 willingly accompanied the appellant to his house and knew his mobile number off head. She even referred to him in her evidence as *Dan* which is evidence of a cordial relationship between them.

28. It is worth noting that it is through the mobile number PW3 provided to PW4 that PW3's parents got to learn from a conversation held between PW3 and the appellant that she had been admitted at Miliki Afya Clinic and went to pick her from there.

In view of the foregoing, I am satisfied that PW3's identification of the appellant as her assailant was free from any possibility of error. It was a case of recognition which is always more reliable than a case of identification of a stranger.

29. I have considered the appellant's statement in defence and like the learned trial magistrate, I do not find it reasonable, credible or plausible. It is difficult to discern how a child like the complainant could have fabricated such serious charges against the appellant and why she would have wanted him evicted from the area he used to reside. The appellant did not offer any reason for the complainant's alleged motivation. He did not also question her on the same during cross examination.

30. For the above reasons, I have come to the same conclusion as the learned trial magistrate. I find that the learned trial magistrate properly analysed all the evidence presented before her and correctly found that the prosecution had proved its case against the appellant beyond any reasonable doubt. I am thus convinced that the appellant was properly convicted.

31. Turning to the appeal against sentence, the appellant complained that the learned trial magistrate did not consider his plea in mitigation before passing sentence. This cannot be further from the truth. The court record clearly shows that before pronouncing sentence, the learned trial magistrate considered the appellant's plea in mitigation. This is what she said:

> ***"The accused is a first offender, I have considered the plea in mitigation. The offence is serious. ……..."***

The appellant's complaint is therefore incorrect and is unsustainable. The sentence meted out on the appellant is also lawful as it was in accordance with *Section 8 (3)* of the *Sexual Offences Act* and it took into account the period the appellant had been in lawful custody during the trial.

32. In view of the foregoing, I am satisfied that this appeal is not merited and it is accordingly dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022.

C. W. GITHUA

JUDGE

In the presence of:

Appellant present

Mr. Mutuma for the respondent

Ms Karwitha: Court Assistant